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Supreme Court, U.S.
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CASE NOS. 85-5609 and 85-5819

THE UNITED STATES SUPREME COURT

1987 TERM

WILLIAM SCHARRER,

Petitioner/Defendant,

vs.

UNITED STATES OF AMERICA,

Respondent/Plaintiff.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Atlee W. Wampler, III
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-8880

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether, when considering violations of the rule of Doyle, on direct review of a federal court decision, the standard of review should be harmless error or error substantially affecting the course of the trial?

2. Whether the prosecutor's clear violation of the rule of Doyle in the present case was harmless beyond a reasonable doubt, or in the alternative, whether it so infected the trial with unfairness as to make the resulting conviction a denial of due process?

3. Whether, if defense counsel's objections prior to the prosecutor's entry into a line of cross-examination frought with foreseeable Doyle error are insufficient for reversal under Doyle analysis, Doyle violations should be reviewed as plain, fundamental error or whether defense counsel's failure to object and move for mistrial after clear violations of the rule of Doyle consti-

tutes a violation of the Defendant's Sixth Amendment right to effective assistance of counsel requiring reversal?

4. Whether a court of appeals improperly sanctions a violation of a defendant's Fifth Amendment right to due process where a defendant: (1) requested instructions regarding the theory of his defense and definitions of key legal terms in a complex federal income tax fraud and land evaluation case; (2) presented evidence at trial to support such instructions; (3) cited appropriate legal authority for the proposed instructions; (4) had those instructions rejected; and (5) got no instructions on those technical legal terms necessary for his defense, and the court of appeals approves the trial court's giving general instructions and specifically finds that the defendant's argument on the key legal terms and issues is an adequate substitute for the rejected instructions?

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REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORT OF OPINION

The official report of the opinion of the United States Court of Appeals for the Eleventh Circuit is an unpublished per curiam opinion entered on August 28, 1987 in the cases numbered 85-5609 and 85-5819. Appendix A-1.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The decree sought to be reviewed is dated August 28, 1987, and was entered on August 28, 1987. Appendix A-1.

The date of the Order of the United States Court of Appeals for the Eleventh Circuit denying rehearing and en banc review is October 13, 1987. Appendix A-5.

The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

ARTICLE [V.]

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall

have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

Facts of Disposition of the Case

William Scharrer, Petitioner/Defendant, was convicted in U.S. District Court of criminal conspiracy and aiding and abetting charges of federal income tax evasion and filing of false income tax returns of Victor Posner by preparing what the prosecutor alleged to be inflated appraisals of value for two real estate tracts, a 16-acre tract and 6-acre tract, given by Mr. Posner to Miami Christian College and for which Mr. Posner claimed charitable gift deductions on his income tax returns. The Defendant filed post-trial motions which were denied after a hearing in the District Court.

The Defendant sought a reversal of his judgment and conviction by appealing to the Court of Appeals For The Eleventh Circuit which, in a per curiam opinion, affirmed the Defendant's conviction (Appendix A-1) and denied his petition for en banc review and rehearing (Appendix A-5). The Court of Appeals held that, although specific legal definitions, explanations and theory of the defense were requested, refused and refusal objected to, it was legally sufficient for a trial court to give general instructions and allow the Defendant's attorney's argument to be an adequate substitute for the requested instructions. The Court of Appeals summarily disposed of the clear Doyle violation issue raised before that court.

Facts at Trial

The Defendant, a licensed real estate broker and an appraiser of real estate in the Greater Miami area for thirty years (R19-1237-1242), agreed with Victor Posner to

appraise a 16 acre undeveloped tract of land as of December 1975 to be given to the Miami Christian College and to locate another appraiser to prepare a separate independent appraisal (R19-1253). The Defendant understood that Mr. Posner was going to take a deduction on his income tax returns as a charitable gift based on the two appraisals (R19-1290).

The Defendant contacted Leonard Bisz, a well known conservative real estate appraiser (R19-1260) who initially provided a second appraisal letter valuing the 16 acres at $1,500,000 amount; however Mr. Bisz never completed an appraisal report (R19-733). The Defendant's appraisal letter (R19-1258) and formal appraisal report valued the 16 acres at $2,000,000 or $125,000 per acre as of December 1975 based upon Mr. Scharrer's opinion that the highest and best use of the 16 acres was as rezoned commercial or high density dwelling (RE-127). The Defendant

believed that it was possible to obtain such rezoning in the reasonable future, even though the land was then zoned modified acre estates.

The Defendant advised Mr. Felabom, a business officer of Miami Christian College, and the College's accountants in correspondence that the fair market value of the 16 acre gift as currently zoned was realisticly $50,000 per acre (R19-1286, RE-117-121). The Defendant gave this opinion because he was aware at that time, that the College intended to use the land as a college and needed a book value for the gift reflecting the value of the land as zoned at that time (R19-1286-1293 and R4-112-692-694, 698-700 and RE-32-34, 38-40). The Defendant attached the two appraisal letters for $125,000 per acre and $93,750 per acre to that $50,000 per acre Felabom correspondence (R 19-1291-1293) and Appendix A-15. The government claimed the Felabom correspondence was the "Smoking Gun"

proving the Defendant did not believe his $125,000 per acre appraisal was truthful (R20-1582).

Miami Christian College decided to sell the land and locate its campus elsewhere because it needed money (R15-561-562) and had been unsuccessful in securing a special use zoning variance allowing the building of dormitories big enough for the size campus it wanted (R14-363, 366, 406). Various offers were made for the land and the land sold for approximately $125,000 per acre (R19-1304), (R17-911) in April, 1981 (R17-914) still zoned modified acre estates and not contingent upon rezoning (R17-918) and (DHE-bb).

The pivotal issues at trial were: (1) the Defendant's credibility regarding his explanation of the difference between the value of the 16 acres stated in his "Smoking Gun" letter to the official at Miami Christian College as the fair market value of the 16-acre gift of land, as then zoned, of

$50,000 an acre and value of the same 16 acres as stated in his appraisal at $125,000 an acre which took into account the reasonable possibility that the land could be rezoned for commercial or other high density usage in the reasonable future; and (2) certain legal definitions and explanations relating to technical terms involving the fair market value of the 16 acres as to (a) the reasonable possibility that the land in question could be rezoned for commercial or other high density usage in the reasonable future, (b) the "highest and best use" of the land in question, (c) the effect of distress sale factors on the fair market value, and (d) the difference between the legal definition of fair market value in Florida tax law which uses current zoning only and fair market value in federal income tax law which includes the possibility of rezoning in the reasonable future.

The prosecutors cross-examined the Defendant (R19-1377-83) at trial about, and commented in closing argument (R20-1582-83) on, the Defendant's silence regarding an explanation for the July 29, 1976 letter (the "Smoking Gun" letter) to Mr. Felabom (the college business official) during a pre-indictment conference in October, 1980 in the Southern District of New York United States Attorney's Office. That conference was conducted by Assistant United States Attorney Handal, who was in charge of the Southern District of New York Grand Jury investigation of the Defendant. Mr. Handal told the Defendant that he was the target of a Grand Jury investigation and advised him of his Miranda rights. (R19-1377) (DHE-ee). During the course of the conference, the Defendant clearly invoked his Miranda rights when on the advice of counsel and pursuant to the privileges enunciated by Mr. Handal, the Defendant declined to make any comment about

the "Smoking Gun" letter. (See R19-1383). Mr. Scharrer had been the subject of investigation for over two years at the time of the conference with the Department of Justice. The Defendant's then counsel testified in the post trial hearings that at the conference he requested that some areas of questioning be passed over because he was newly retained, and not yet familiar with the facts in those areas of questioning. (See Record Supplement, R 22-128-135, 145).

During the trial cross-examination of the Defendant, the prosecutor knew he was entering into a potentially dangerous area of cross-examination and announced to the court in a sidebar conference that he was going to cross-examine the Defendant about statements the Defendant did not make to agents of the government after being advised of his Miranda warnings (see, R19-1377). Defense counsel objected twice to the entire line of questioning (R19-1377, 1378) in advance of the

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inquiry and was overruled by the Court (R19-1378). The prosecutor then asked the Defendant, in the presence of the jury, if he had told former AUSA Handel that the "Smoking Gun" letter was poorly worded. The Defendant denied making such a statement (see, R19, page 1381). However, the prosecutor was not satisfied with the Defendant's denial, and continued to press the Defendant about "the fact" that the Defendant did not give Mr. Handel the same explanation about the "Smoking Gun" letter that the Defendant offered to the jury in trial earlier that day. Defense counsel again objected and was overruled (R19-1382). The Defendant's response was:

> "I wanted to give Mr. Handel the same explanation I gave the Court today, but my attorney would not let me.
>
> The Court: The answer is, though, at the time you didn't give the explanation, right, Mr. Scharrer?
>
> The Witness: That's correct. We just didn't answer it. My attorney said, "I will not permit my client to answer it."

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The Court: All right. Let's move on. R19, page 1383.

In rebuttal closing argument, the prosecutor stated:

> "Mr. Culverhouse (the defendant's trial counsel) attempted to explain it away and Mr. Scharrer attempted to explain it away in his testimony, but you will recall that I asked Mr. Scharrer:
>
> Isn't it a fact that during the investigation of this case, the Department of Justice has this letter?'
>
> Mr. Scharrer requested a conference with the Department of Justice. He met with Mr. Handel, the former Assistant United States Attorney that had this, and he was asked about this letter, and he admitted -- Mr. Scharrer admitted that he did not give the explanation that he gave in this courtroom about it.
>
> Now, he said that his lawyer told him not to, but I submit to you, ladies and gentlemen, if he had a viable, if he had a logical, if he had a fair explanation for that letter, he would have told it to Kenneth Handel. He would have told it to the Department of Justice.
>
> He has now had since 1980 to think about and analyze, and I submit to you, quite frankly, make up an explanation that would fit into the facts and circumstances here, and

> that is what he told you on that witness stand.
>
> And yet I submit to you that he still cannot make this thing go away.
>
> Now, he tries to make it go away by saying, 'Well, who would attach these appraisals in this fashion? Who would state so clearly in this letter that it was being done for tax purposes, but it wasn't realistic, and all you could get for it when you sold it was $50,000'". R20-1582-1583.

The trial court rejected the Defendant's proposed charges with proper citation of legal authorities that clearly set out the nature of the defense case on valuation, the definition of highest and best use, the nature and effect of a distress sale, and the basis in law to argue the difference between an appraisal of value as currently zoned and one that takes into account future zoning, (R3-86-432, 433, 461, 642, 470, 471, 472, 473, 474; R3-87-516, 517, 520). The Defendant's requests for his instructions were renewed at R20-1458, L14.

Expert testimony providing the evidentiary basis for the denied instructions on the effect of the possibility of future rezoning was presented by Mr. Stutsman at R18-1115, 1126, 1131 and 1132 that confirmed that Mr. Scharrer's evaluation was reasonable and probable and that the zoning board should have approved a planned use development if properly prepared and submitted to it. Mr. Blake confirmed Mr. Scharrer's appraisal valuation to be reasonable and highly probable and supporting the position that the zoning board should have granted rezoning based upon submission of land use planning at R18-1150, 1157, 1167 and 1170. The Reynolds & Reynolds report entered through Mr. Bisz' testimony and Mr. Bisz on several occasions supported Mr. Scharrer's appraisal as a reasonable appraisal with zoning that would probably be approved or should be approved by the

zoning board at R16-744, 745, 783, and 786.

The evidentiary basis for the distress sale instruction is found in the testimony of Mr. Kenneth Ryskamp, who was then the College's attorney, of "dumping" the property on the market for immediate fire sale price; R13-265-267; R13-275, L12; R13-276, 277, 278, L5; and in Dr. Gangle's (the then President of the College) testimony regarding the need for an immediate sale due to extreme financial hardship at R15-544, L9; R15-561-562; and R14-370-371.

The evidentiary basis for fair market value for Florida State tax purposes (fair market value based on current zoning status) is Government Exhibit 638, RE117, the Defendant's 16 acre appraisal, RE127.

The trial Court failed to guide the jury with appropriate instructions statie

Defendant's theory of his case, defining the key legal term "highest and best use", explaining the nature and effect of a distress-sale and differentiating the meaning of fair market value in Florida tax law with the meaning of fair market value in federal income tax law despite the repeated attempts of the Defendant's counsel to secure jury instructions on how to view the key Government Exhibits 638, 630 and the Defendant's 16 acre appraisal, RE117, 118, 127. The trial court later recognized the crucial distinctions between fair market value based on current zoning status and fair market value based on a highest and best use opinion of rezoning in its post-trial ruling at RE32-34, 38-40, (Appendix A-23-A-27).

STATEMENT OF BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The federal government indicted the petitioner under the federal criminal laws and federal criminal income tax laws 18 U.S.C. 2, 371 and 26 U.S.C. 7201 and 7206(1).

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Violations of Rule of Doyle

The record in the present case reveals clear violations of Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d, 96 S.Ct. 2240 (1976). First, the prosecutor intensely cross-examined the Defendant about his post-Miranda warning silence concerning a critical piece of evidence in order to impeach the Defendant's testimony at trial about the same evidence. (R. 19-1377-1383). Second, defense counsel's timely objections were overruled at sidebar after the prosecutor declared his intention of entering the

area of cross-examination clearly frought with forseeable Doyle error. (R. 19-1377). Third, the prosecutor argued to the jury that the Defendant's testimony about the evidence at trial should not be believed because on a prior occasion the Defendant had followed his lawyer's advice to remain silent when questioned about the matter by a government prosecutor. (R. 20-1582-1538).

A comparison of the facts in the present case with those of Greer v. Miller, 438 U.S. ___, 97 L.Ed.2d 618, 107 S.Ct. 568 (1987), highlights the Doyle violation below. In Greer the prosecutor attempted to undertake the impeachment proscribed by Doyle, but was stopped short by the trial judge. 97 L.Ed.2d at 629-630. In the present case, the trial judge refused to stop the improper impeachment and, in fact, joined in the exact questioning prohibited by Doyle.

(R. 19-1381-1383). The prosecutor then went on to improperly argue to the jury that the Defendant's post-Miranda warning silence on advice of counsel was cause to disbelieve the Defendant's in-court explanation of the government's key piece of evidence. (R. 20-1582-1583).

The Court in Greer, supra, concluded that no Doyle violation had occurred and, therefore, reviewed the case further only to determine whether the prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." 97 L.Ed.2d at 630. The Court never reached the question of whether the harmless error standard applies to Doyle violations. The Petitioner respectfully submits that this question must be reached in the present case and answered in the affirmative.

The opinion of the dissenting justices in Greer, 97 L.Ed.2d at 633, succinctly states the strong reasons for applying the harmless error standard of Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967), to the constitutional error resulting from a Doyle violation. Such abridgements of an accused's constitutional rights to remain silent to a fair trial and to effective assistance of counsel are extremely serious and their impact is "rarely harmless" Williams v. Zahradnick, 632 F.2d 353, 364 (4th Cir. 1980)(citing practice in the 5th Circuit with approval). For this reason, the Federal Circuit Courts of Appeal have uniformly applied the "harmless beyond a reasonable doubt" standard when reviewing Doyle violations.

The Defendant's prosecution was a circumstantial evidence case based merely upon the allegation that the Defendant

gave an opinion about the value of the property donated which the Defendant knew to be false. The question of the Defendant's guilt was totally dependent upon the jury's determination of his credibility. The improper use of the Defendant's invocation of his rights against self-incrimination had a clear adverse impact upon the Defendant and there is not one scintilla of evidence which would indicate that the error was harmless.

Only an application of the harmless error standard in the review of error associated with Doyle violations will ensure that convictions are not secured in this and in future cases by penalizing defendants for invoking their most basic constitutional rights after being assured that they will not be so penalized.

Should this Court choose to overrule the unanimous application by the Circuits of the harmless error standard

to Doyle violations, the Defendant's conviction must still be reversed. The prosecutorial misconduct below was so severe that it infected the trial with unfairness to such a degree that the resulting conviction constitutes a denial of due process. Donnelly v. De Christoforo, 416, U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431, (1974).

The Petitioner further submits that the prejudice resulting from the Doyle violation in this case was so immediate and severe that a curative instruction, and therefore, a contemporaneous objection, would have been of no value. Defense counsel in the present case objected before the violation occurred and was overruled. Further objections or motions on the matter would clearly have been futile. See, Greer, supra, 9 L.Ed.2d at 634 and 636. Therfore, the decision of the Circuit Court should be

reversed for the reasons stated above. If, however, the Court concludes that the objections were insufficient to preserve the matter for appeal, this Court should decide whether Doyle violations are plain, fundamental error, United States v. Remigio, 767 F.2d 730, 734 (10th Cir. 1985), or whether the conviction must be reversed due to ineffective assistance of counsel. Strickland v. Washington, 46 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984); Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987).

Instruction Issues

If the Court of Appeal's opinion that general instructions and the argument of defense counsel are a legally sufficient substitute for a trial court's instructions on key legal terms is allowed to stand, then that opinion will directly conflict with long established

principles of fundamental fairness. Taylor v. Kentucky, 436 U.S. 478, 488-489, 98 S.Ct. 1930, 1936-1937, 56 L.Ed.2d 468 (1978); United States v. Wolfson, 573 F.2d 216, 220, 221 (5th Cir. 1978); United States v. Middleton, 690 F.2d 820, 826 (11th Cir. 1982); United States v. Polowichak, 782 F.2d 410, 417 (4th Cir. 1986); and the Fifth Amendment.

The trial court in this case did not define, upon appropriate request, "highest and best use" as the most profitable potential use including all reasonable possibilities of rezoning. Without a definition of the term "highest and best use," there is no way for a jury to know that the term highest and best use in federal tax law includes reasonable possibilities of rezoning. The trial court did not define the nature and effect of a "distress sale" nor the differing valuations for Florida ad valorem taxes and

federal income taxes. The trial court refused to give a charge as to the Defendant's theory of his defense. The court below used argument of defense counsel to find sufficiency of the trial court's instructions.

This Court emphasized in Taylor v. Kentucky, supra 436 U.S. at 489, 56 L.Ed.2d at 477, that arguments of counsel cannot substitute for instructions by the court and that it is the court's duty to safeguard a defendant's rights by giving appropriate legal instructions upon appropriate request.

The trial court's only instruction regarding valuation was the following:

> "The rules and regulations of the Internal Revenue Service contain a definition for this [fair market value] term which you must apply. The rules say that fair market value is the price at which the property would change hands between a willing buyer and a willing seller neither being under any compulsion to buy or sell and both having a reasonable knowledge of all of the relevant facts, any appraisal

must consider its highest and best use." (R. 21-1661).

Wolfson supra, was an income tax fraud csae involving fair market valuation of yachts and was virtually on all fours with the case before the Court below. In Wolfson, a Marine surveyor was alleged to have overstated in an appraisal the value of 17 yachts donated to charities. One of the three techniques the government used in its case was to introduce evidence of the sale price of which the charities sold the donated yachts. Id. at p. 219. Wolfson's theory of defense was that the charities were not good indicators of market value because the charities were in need of quick cash and accordingly the sales were forced or distress sales. The trial court failed to provide precise instructions on that point and the only guidance provided to the jury was that of defense counsel in closing argument.

In Wolfson this Court held: that use by the trial court of a single sentence from the

Defendant's requested instruction of the legal jargon of forced or distress sales set in the midst of largely irrelevant instructions was not adequate; that the judge failed to meet his obligation for providing precise instructions on the factual issues in controversy; that the jury instructions must define with substantial particularity the factual issues and clearly instruct the jurors as to principals of law which they are to apply in deciding the factual issues involved in the case before them; that a Defendant is entitled to a charge which precisely and specifically, rather than merely generally or abstractly, points to the theory of his defense; that the reviewing court must look to the words of the trial court, not defense counsel, in determining if the instructions are adequate; that when the evidence does not clearly relate to the instructions, a reviewing court cannot rely on defense counsel's closing argument to save the Judge from

error; and that failure to give better instructions in view of a Defendant's objection and request for a different charge is reversible error. Wolfson was followed in United States v. Lewis, 592 F.2d 1282, 1285, 1286 (5th Cir. 1976) and United States v. Satterfield, 644 F.2d. 1092, 1096 (5th Cir. Unit B 1981).

An additional principle was added to Wolfson in United States v. Anderton, 629 F.2d 1044, 1047-1049 (5th Cir. 1980), that when an instruction uses a term of legal significance, its meaning must be explained, especially when there is a request for clarifying instructions. Anderton involved an issue of the definition of the word "agent" in an entrapment defense to a bribery of an IRS agent charge.

These key legal terms and issues were central to the Defendant's valuation defense. The jury was completely without guidance on key issues of this tax case,

which goes to the very basis of the jury's ability to evaluate the evidence, and constitutes plain error affecting the Defendant's substantial rights. See United States v. Carter, 721 F.2d 1514, 1539 (11th Cir. 1984).

CONCLUSION

The Court of Appeal's failure to reverse the conviction in the present case conflicts with the decisions of this Court in Greer and Doyle, and other federal decisions cited above which have applied the rule of Doyle. The decision below raises an important question of federal law regarding the application of the harmless error standard which should be decided by this Court. In addition, the Court of Appeals below: departed from, and sanctioned the District Court's departure from, the accepted and usual course of judicial proceedings in permitting argument of defense counsel to substitute for necessary instructions by the trial court that calls for an exercise of this Court's power

of supervision; decided a federal question in a way in conflict with a decision of this Court; and rendered a decision in conflict with the decision of other federal courts of appeals on the same matter. Therefore, Certiorari should be granted and the Defendant's conviction reversed.

D O NOT P U B L I S H

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 85-5609 and 85-5819

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM SCHARRER,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Florida

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(August 28, 1987)

Before VANCE and ANDERSON, Circuit Judges, and PITTMAN*, Senior District Judge.

PER CURIAM:

This is an appeal from criminal convictions for conspiracy, aiding and

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*Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

abetting tax evasion, and two counts of aiding and assisting in the filing of false tax returns. The conviction appeal has been consolidated with an appeal from the order denying the defendant's post-trial motions. The defendant-appellant raises six assignments of error:

1. Challenges to refused jury charges;

2. Whether the prosecutor's improper cross-examination of the defendant and argument to the jury of the defendant's post-Miranda warning silence and thedistrict court's elaboration of the error was reversible error;

3. Whether the overall misconduct of the prosecution substantially prejudiced the defendant's rights;

4. Whether the defendant's assistance of counsel and counsel's violation of Fed. R. Crim. P. 44(c) created actual conflicts of interest which require reversal;

5. Whether error by the district court resulted in substantial prejudice to the defendant, denying the defendant a fair trial;

6. Whether the verdict was against the weight of the evidence and whether the evidence viewed as a whole

establishes the defendant's guilt beyond a reasonable doubt.

Scharrer, defendant-appellant, contends that the central issue in this case was whether his valuation opinion was a reasonable valuation opinion. He argues that the appraisal was based on a reasonable possibility that the property would be rezoned to commercial or high-density residential use.

The appellant sought instructions on distress sales, on differing valuations for state ad valorem taxes and federal income taxes, intent, and on the effect of future rezoning on the market value of the subject parcels. He objects to the trial court's refusal to give those requested instructions. Portions of some of these were incorporated in the court's oral charge.

While a defendant is entitled to an instruction relating to his theory of defense if there was evidence presented at trial to support it, a reviewing court need only

ascertain whether the charge, when viewed as a whole, fairly and correctly states the issues and law. E.g., United States v. Russell, 717 F.2d 581, 521 (11th Cir. 1983).

A review of the trial court's instructions reveals that, as a whole, the court gave a sufficient instruction on the manner by which fair market value is determined, and defendant's intent. There was expert testimony on the fair market value issue, and the jury was instructed substantially as requested as to how to weigh the experts' opinions. Appellant's attorney freely argued defendant's intent and the impact of the possibility of future zoning changes on the present market value. We conclude, therefore, that there was no reversible error in the court's refusal to give appellant's requested instructions.

A careful review of the record reveals that appellant's other assignments of error are without merit. The judgment below is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 85-5609 & 85-5819

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM SCHARRER,

Defendant-Appellant.

Appeal from the United States
District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion August 28, 1987, 11 Cir., 1987, ____ F.2d ___).
(October 13, 1987)

Before VANCE and ANDERSON, Circuit Judges, and PITTMAN*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc

are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge
*Honorable Virgil Pittman, Senior U.S. District Judge
for the Southern District of Alabama, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-352-CR-SPELLMAN

UNITED STATES OF AMERICA,

Plaintiff,

v.

VICTOR POSNER and
WILLIAM SCHARRER,

Defendants.

_____/

MEMORANDUM OPINION AND ORDER

Victor Posner and William Scharrer were charged in a twelve count indictment with criminal violations of the federal income tax laws. The gist of the offenses against them was that Scharrer willfully provided Posner with falsely inflated appraisals of certain land that Posner donated to the Miami Christian College and that Posner willfully used these falsely inflated appraisals to take improper deductions on his tax returns for the years 1975-1979.

The case proceeded to trial on July 26, 1984. On August 1, 1984, the Government offered into evidence a letter written by Scharrer to one Loren Felabom, the business manager of Miami Christian College. Scharrer stated in this letter that his $2 million dollar appraisal of the property Posner donated was "unrealistic inasmuch as it is being developed for tax purposes." Scharrer also stated that "[f]rom a realistic market price" $50,000 an acre, i.e., $800,000 for the 16 acres, "would probably be it." The Court ruled that this letter was not admissible as evidence against Posner because it was hearsay and did not fit into any exception to the hearsay rule. Moreover, the Court ruled that, in a joint trial, an instruction by the Court that this letter was only admissible against Scharrer was not sufficient to adequately cure the prejudice that would adhere to Posner from the admission of this letter into evidence.

Accordingly, upon Posner's motion for a severance, Posner was granted a separate trial.[1]

The Government has now filed a motion in limine, prior to the Posner trial, requesting this Court to reconsider its rulings on the letter and other documents made during the earlier trial. In addition, the Government requests this Court to rule, in advance of trial, as to the admissibility of other items that have not previously been offered into evidence. For the reasons detailed below, the Court will stand on its previous ruling as to the letter. Because the Government has not provided sufficient reasons for this Court to rule, in advance of trial, on the other matters raised in the motion, the Court will decline at this time to rule on the admissibility of these documents.

SCHARRER'S LETTER TO FELABOM

At the original trial, and again in this motion, the Government argues that the July

29th letter from Scharrer to Felabom is admissible against Posner either as a statement made by a coconspirator in furtherance of the alleged conspiracy pursuant to Rule 801(d)(2)(E), Federal Rules of Evidence, or as a statement against penal interest under Rule 804(b)(3), Federal Rules of Evidence. Neither rationale is convincing.

A. The letter was not "in furtherance" of the consoiracy

Conspiratorial declarations are admissible against a party under Rule 801(d)(2)(E) when it has been shown by a preponderance of the evidence, independent of the evidence itself:

(1) that a conspiracy existed;

(2) that the co-conspirator and the defendant against whom the co-conspirator's statement is offered were both members of the conspiracy; and

(3) the the statement was made during the course and in furtherance of the conspiracy.

United States v. James, 590 F.2d 575, 582 (5th Cir. 1979) (en banc), cert. denied, 442 U.S. 917 (1979).[2]

The requirement that a co-conspirator's statement must be pursuant to and in furtherance of a conspiracy is implicit in the rationale for why these statements are not considered hearsay. Declarations of a co-conspirator are competent against an accused "because they are a part of the execution of the plan and have been impliedly authorized by the others." United States v. Kelly, 105 F.2d 916 (2d Cir. 1939). See also Lutwak v. United States, 344 U.S. 604 (1953).

After conducting a "James" hearing in this case, the Court ruled that there was sufficient evidence that a conspiracy existed and that Scharrer and Posner were both members of this conspiracy. The Court found, however, that the letter was not admissible against Posner because it was not made "in furtherance" of the conspiracy.

The Government here repeats the argument it made at trial that Scharrer wrote the July 29th letter to Felabom in an effort to "conceal" the alleged conspiracy to claim a fraudulent deduction. According to the Government, the letter "provided a cover story that allowed the conspiracy to continue." The Government claims that Scharrer's statement that his own appraisal was "unrealistic inasmuch as [it was] developed for tax purposes", was designed to "allay suspicions" as to the discrepancy between the $2 million dollar appraisal and the realistic market value of $800,000. The Government reasons that Scharrer must have known when he wrote the letter that a "cover story" would be needed, because the College was already considering putting the land on the market.

The Government's theory of admissibility is recognized in that statements made by a co-conspirator to allay suspicions can be "in

furtherance" of a conspiracy and therefore admissible under the co-conspirator's exception to the hearsay rule. See, e.g., United States v. Griggs, 735 F.2d 1318, 1325 (11th Cir. 1984); United States v. Miller, 664 F.2d 94, 98 (5th Cir. 1981), cert. denied, 459 U.S. 854 (1982); United States v. Del Valle, 587 F.2d 699, 704 (5th Cir.), cert. denied, 422 U.S. 909 (1979). Moreover, this Court is not unmindful that the "'in furtherance of the conspiracy' standard must not be applied too strictly, 'lest we defeat the purpose of the exception.'" United States v. Miller, 664 F.2d 94, 98 (5th Cir. 1981), cert. denied, 459 U.S. 854 (1982) (quoting United States v. James,510 F.2d 546, 549 (5th Cir.), cert. denied, 423 U.S. 855 (1975)).

But, from the record in this case, the Court finds absolutely no support for the proposition that Scharrer wrote the letter in question in order to "allay suspicions."

The Government has not presented any evidence to this Court that Felabom or any other members of the Board of the Miami Christian College were ever disturbed by the discrepancy between the appraisal of the land Scharrer did for Posner and the estimated value he placed on the land for the College's books. The Government claims that the "best evidence" that the letter was a successful cover-up is the fact that no officers or trustees of the College ever asked any questions about the gross disparity between Scharrer's $2 million figure and the $512,000 that the property could have sold for in 1977.[3] This argument merely begs the question.

But even putting aside the complete lack of evidence that the officers and trustees were ever concerned about the discrepancy, an examination of the letter itself demonstrates that Scharrer was not providing a plausible explanation that would "allay suspicions."

Indeed, quite the opposite is true. The letter could only serve to create suspicions for there is no evidence that any of the officers or trustees of the College even knew of Scharrer's $2 million appraisal except as a result of Scharrer volunteering this information to them. Since Scharrer actually attached a copy of his appraisal to the letter to Felabom, under the Government's theory, this Court would have to find that Scharrer was simultaneously disclosing his fraudulent scheme and attempting to allay suspicions about it. This, the Court cannot and will not do.

This Court finds that a letter that "spilled the beans" to Felabom, who was neither a participant in the conspiracy nor, at the time the letter was written, a possible witness against it, could not have served any conspiratorial purpose. In its own context, Scharrer's letter, like the co-defendant's admission of ownership of a

distillery held inadmissible in United States v. Harrell, 436 F.2d 606 (5th Cir. 1970), "could not possibly advance any object of the conspiracy." Id. at 613. See also United States v. Means, 695 F.2d 811 (5th Cir. 1983) (error to admit co-conspirator's statement to Government witness regarding alleged scheme, which was "mere idle conversation" not in furtherance of the conspiracy); United States v. Phillips, 664 F.2d 971 (5th Cir.1981) (error to admit co-conspirator's retrospective statement made in conversation about past event); United States v. Castillo, 615 F.2d 878, 882-83 (9th Cir. 1980) (error to admit statement that was "nothing more than a casual admission to someone he decided to trust"). Accordingly, the letter cannot be admitted against Posner under the co-conspirator's exception to the hearsay rule.

B. The letter is not admissible as a declaration against penal interest

The Government argues, alternatively, that the letter written by Scharrer to

Felabom is a declaration against penal interest. In this view of the letter, the Government claims that Scharrer "admitted" that his appraisal for $2 million dollars was "highly inflated" and was intended to be used by Posner for improper tax purposes. The Government argues that, because the letter contains "a statement by Scharrer that tended to expose him to criminal liability," it should be admissible against Posner under Fed. R. Evid. 804(b)(3) if Scharrer is unavailable as a witness.

As a preliminary matter, this Court finds that any ruling on this theory of admissibility is necessarily premature because, at this point, there is no way of knowing whether Scharrer will be available to testify at Posner's trial. Indeed, we will not know whether Scharrer is "available" to the Government until he is subpoenaed to Posner's trial and called to testify. Since the declaration against penal interest

exception is applicable only when a witness is unavailable to testify at trial, this Court cannot really make a determination as to the admissibility of the letter under this exception prior to trial.

This Court has previously ruled, however, in the context of the joint trial, that even assuming the unavailability of Scharrer, the letter does not fall within this exception to the hearsay rule. The Court found that the letter fails to meet the "against interest" test because, at the time the letter was written, no tax deductions for the donated land had been claimed. The Court will stand by this ruling. When a statement is being offered against a defendant in a criminal trial, as it is here, constitutional confrontation clause values require the Court to strictly apply the "against interest" test.

Rule 804(b)(3) provides:

> Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The rationale for the "against-interest" exception to the hearsay rule is that a person will not make a statement that would be damaging to himself unless it is true. And it is this same rationale that would provide the statement with sufficient "indicia of reliability" to meet the threshold of admissibility under the confrontation clause. See Dutton v. Evans, 400 U.S. 74 (1970). Obviously, if the declarant does not believe the statement to be against his interest, this rationale fails. See 4 Weinstein &

Berger, Evidence 804(b)(3)[02] at p. 98 (1981).

When the declaration against penal interest exception to the hearsay rule was adopted as part of the Federal Rules of Evidence in 1975, Congress was acutely aware that an againstpenal-interest statement offered against the accused in a criminal case raised serious constitutional evidentiary issues. S. Rep. No.93-1277, 93d Cong., 2d Sess., reprinted in [1971] U.S. CODE CONG. & AD.NEWS 7051, 7068. The draftsmen of the new rule "left to the courts the task of delineating prerequisites to the admissibility of inculpatory against-interest hearsay," recognizing that "the central underpinning of such a safeguard must be the confrontation clause of the United States Constitution." United States v. Alvarez, 584 F.2d 694, 700 (5th Cir. 1978).

After reviewing the requirements of the confrontation clause as interpreted in recent

decisions of the Supreme Court, the Alvarez Court stated that "the admissibility of inculpatory declarations against interest requires corroborating circumstances that 'clearly indicate the trustworthiness of the statement.'" 584 F.2d at 701. The Court then looked to decisions that applied the "trustworthiness" standard to statements that tended to exculpate the defendant and stated that a determination of trustworthiness under this exception to the hearsay rule involves both the "probable veracity of the in-court witness" and the "reliability of the out-of-court declarant." Id. As to the "reliability" element, the Court noted that "the traditional surety of reliability for the hearsay exception" is that the statement strongly contravenes the declarant's interest. Id.

The Fifth Circuit again considered the interaction between constitutional confrontation values and the against-penal-

interest exception to the hearsay rule in United States v. Sarmiento-Perez, 633 F.2d 1092 (5th Cir. Unit A 1981). The Court observed that "[t]he admission under Rule 804(b)(3) of againstinterest-of-declarant hearsay statements that inculpate a criminal defendant results in the diminution of rights traditionally viewed as essential and fundamental components of an accused person's right of confrontation." Id. at 1100. The Court therefore found that "a clear distinction must be drawn between statements against penal interest that are offered to exculpate a criminal defendant, as against those that are offered to inculpate him." Id. The "expansive" interpretation of the "against interest" requirement that applies to exculpatory declarations against interest under Rule 804(b)(3) "is not appropriate when such hearsay is offered to inculpate a criminal defendant on trial." Id. at 1101. When the declaration is used against a

defendant, confrontation rights are implicated, and it is therefore not sufficient that the statement merely have "probative value" in a trial against the declarant. The Government must demonstrate that "the statement clearly and directly implicates the declarant himself in criminal conduct." Id. (Emphasis added).

When Scharrer's letter is analyzed under these standards, it is plain that it cannot be admissible against Posner in a criminal trial. First, as the Court previously found at the joint trial, the letter cannot meet the "against interest" test because at the time the letter was written in July of 1976, Posner had not even taken a tax deduction for the land he donated to the Miami Christian College. The evidence at trial demonstrated that Posner did not file any tax returns with the deduction in question until October, 1976.

But even more importantly, notwithstanding the Government's characterization of the letter as the "smoking gun" in this case, the letter itself is not "clearly and directly" against Scharrer's penal interest. There is a reasonable explanation for what he wrote to Felabom that does not implicate Scharrer in a criminal conspiracy and would not expose him to criminal liability. And a statement is insufficiently against penal interest where "there are possible explanations ... inconsistent with culpability." United States v. Pena, 527 F.2d 1 356, 1361-62 (5th Cir. 1976).

When Scharrer testified at his own trial, he explained tothe jury, as he had to the grand jury, what he meant when he wrote that his appraisal was "probably unrealistic in that it was being developed for tax purposes." Scharrer began his explanation by testifying that Felabom had sent him a letter

in which Felabom requested that Scharrer provide the College's accountants with information regarding the donated land. The letter specifically stated that the accounting firm requested information about the current zoning status of the property and the fair market value of the property based upon current zoning restrictions on use. On a form supplied by the accounting firm, Scharrer wrote that the current zoning status was EUM and modified one acre estates; that the fair market value based on the current zoning status was $800,000; and that the restrictions on the use of the land required the land to be used for single family use.

Scharrer also explained to the jury that he knew that Posner had donated the land as a charitable gift and that Posner would need to put a value on the gift. He therefore appraised the land, in accordance with standard tax practice, at its highest and best use, taking into consideration the

possibility that the land would be rezoned as commercial property. In his letter to Felabom, he stated that the appraised value of the land was probably unrealistic because he knew that the college could not sell the property for $2 million zoned EUM -- the existing zoning. Although Scharrer believed that it was reasonably possible to rezone the property commercially, he felt that

> [t]he college would never get the property rezoned for commercial use. At the time they were trying to locate to the property and even if they had decided to get it rezoned for business use at that time, they would have had to give up their dream of relocating to the property and gone into the real estate business. This would not have been realistic because it would have jeopardized their tax free status as a college, so that didn't make any sense. (Tr. 1291)

Given this explanation, it cannot be said that Scharrer's statements in his letter to Felabom "clearly and directly implicate[ ] [him]. . . in criminal conduct." Sarmiento-Perez 633 F.2d at 1101. Even if the letter could be admitted into evidence as a

statement against penal interest, in the context of this case, it would be a violation of Posner's Sixth Amendment right to confrontation to do so. For it is precisely this explanation of the letter that Posner would be entitled to elicit on cross-examination of Scharrer if he were available to testify. Congress never intended to substitute the Sixth Amendment to the United States Constitution with this rule of evidence.

THE OTHER EVIDENCE

In addition to Scharrer's letter, the Government requeststhis Court to rule, prior to trial, as to the admissibility of other documents. Some of these documents were previously ruled upon by the Court during Scharrer's trial; other documents have not been previously offered.

It is within the Court's discretion to rule on evidentiary matters prior to trial. This Court has found that, as a general rule,

it is a better practice to rule on questions of admissibility as they arise at trial. Prior to trial, there is no way of knowing if the evidence will actually be offered at trial and for what purpose. Moreover, even if it is offered and is admissible for a certain purpose, there is no way of knowing whether its probative value outweighs its prejudicial effect. Rule 403, Federal Rules of Evidence.

Thus, unless good cause is shown, this Court is of the opinion that such matters should be ruled on as they come up at trial; not in the abstract and in anticipation of some hypothetical circumstance that may or may not develop.

The Government has not provided this Court with any reason why these other matters should be ruled upon at this time. Rules 103(c) and 104(c) of the Federal Rules of Evidence will provide sufficient safeguards at the trial of this matter for determining the admissibility of this evidence outside the hearing of the jury.

Unlike Scharrer's letter, these documents are not characterized by the Government as critical evidence to its case against Posner that should be ruled upon prior to trial so that a decision on these documents adverse to the Government could be appealed. The Court therefore will decline to rule at this point and will consider all other evidentiary matters at the time of trial.

DONE AND ORDERED in Chambers, at Miami, Florida, this 19 day of September, 1984.

/s/ Eugene P. Spellman

UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record

FOOTNOTES

1. Scharrer was subsequently convicted on all counts.

2. The Eleventh Circuit applies Fifth Circuit precedent established before September 30, 1981. Bonner v. City of Pritchard, Alabama, 661 F.2d 1206 (11th Cir. 1981) (en banc).

3. The College entered into a contract to sell the land in question for $512,000 in 1977.

D. Highest and Best Use

Source: United States v. 320.0 Acres of Land, 605 F.2d 762, 811-20 (5th Cir. 1979); IRS Valuation Guide

Another term that must be defined in connection with fair market value is highest and best use. When real estate is appraised, the property must be valued with reference to its highest and best use, since the price that a buyer will be willing to pay for a piece of land depends upon what he thinks the land can be used for. The highest and best use is the most profitable use of the property or that use which will yield the highest return on investment. The use must be one which is logical, likely, and reasonably probable, and it will depend on a wide variety of factors such as the property's size, shape and location, potential for growth in the vicinity, the public highways and facilities that are planned or located nearby, and applicable zoning restrictions. the highest and best use of land is not

limited to such uses to which the property can be put immediately at the time of purchase, but also includes such use as a purchaser reasonably believes will become possible within the reasonable future. The length of time encompassed by the "reasonable future" cannot be arbitrarily determined, but depends instead on how long the purchaser believes it is profitable to wait after making his purchase. Because of the wide variety of factors that are important in determining the highest and best use of a piece of property, experts will often differ in their opinions on highest and best use. And, when experts differ on the question of a property's highest and best use, it can be expected that they will differ in their opinions of fair market value.

I will give you further guidance on these two factors -- fair market value and highest and best use -- and how they apply to the questions you must decide here later in these instructions.

B. Distress Sales

Source: United States v. Wolfson, 573 F.2d 216, 221 n.9 (5th Cir. 1978)

Evidence also has been introduced concerning the fact that in 1977 and 1978 the Miami Christian College, through its officials, attempted to sell the land given it by Mr. Posner for a price substantially less than $2,000,000, and that Mr. Scharrer was aware of that sales effort and that Mr. Posner filed a lawsuit to prevent it. Evidence was also introduced concerning the financial condition of the College at the time of that sales effort from which you could find that the College needed to generate funds quickly from the sale of the property.

Fair market value is a question of fact to be resolved upon a consideration of all the evidence. If you find that the College's attempts to sell the land given it by Mr. Posner at a price less than the appraisal arrived at by Mr. Scharrer were motivated by

a serious need on the part of the College to generate funds quickly, you may then conclude that those efforts to sell were not a true test of the property's fair market value and should be accorded little or no weight.

C. Taking Rezoning Into Account

Source: Spies v. United States, 317 U.S. 492, 496 (1943); United States v. 320.0 Acres of Land, 605 F.2d 762, 819 (5th Cir. 1979); Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Co., 108 So.2d 74, 83-84 (Fla. Dist. Ct. App. 1958)

As I explained to you earlier, the fair market value of property is to be determined based on the property's highest and best use. The highest and best use is that use which will make the property most valuable or profitable, but it must be a use for which the property is adaptable, and a use to which it is reasonably probable that the property can be put within a reasonable period of time. The highest and best use of a property may be one that would not be permitted by current zoning restrictions if it is reasonably probable that the would-be buyer and seller would have thought that those restrictions could be changed.

There has been evidence presented in this case concerning the highest and best use

of the property given by Mr. Posner to Miami Christian College. That evidence has included testimony concerning whether or not it was reasonably probable that the zoning on that property could have been changed to accommodate its highest and best use. In reaching your own determination concerning this property's approximate fair market value you should

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	
v.	82-352-CR-SPELLMAN
VICTOR POSNER and WILLIAM SCHARRER,	
Defendants.	

DEFENDANT SCHARRER'S PROPOSED JURY INSTRUCTION #3

If you find from all of the evidence that William Scharrer truly believed in 1975 and 1978 that the 22 acres of land he appraised at the corner of 104th Street and 117th Avenue could be rezoned for commercial or other high density usage and that for commercial or other high density usage the land was worth what he claimed it to be worth, you must acquit him of all charges in this case even though you find he was wrong, for the burden of proof in this case requires the prosecution to prove to you beyond a reasonable doubt that at the time William

Scharrer appraised the land he did not believe it could be rezoned for commercial or other high density usage or that it was worth what he claimed it was worth for commercial or other high desity usage.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	
v.	)	82-352-CR-SPELLMAN
VICTOR POSNER and WILLIAM SCHARRER,	)	
Defendants.	)	

DEFENDANT SCHARRER'S PROPOSED JURY INSTRUCTION #3A

If you find from all of the evidence that William Scharrer truly believed in 1975 and 1978 that the 22 acres of land he appraised at the corner of 104th Street and 117th Avenue could be rezoned for commercial or other high density usage, you must acquit him of all charges in this case even if you find he was wrong, for the burden of proof in this case requires the prosecution to prove to you beyond a reasonable doubt that at the time William Scharrer made his appraisals he did not believe the land in question could be rezoned for commercial or other high density usage.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	
v.	)	82-352-CR-SPELLMAN
VICTOR POSNER and WILLIAM SCHARRER,	)	
Defendants.	)	

DEFENDANT SCHARRER'S PROPOSED JURY INSTRUCTION #4

The value of land on the market as well as for federal tax purposes is determined in light of all the potential uses to which the property could likely be put in the reasonable future. The fact that a piece of property is zoned does not necessarily restrict its value unless the property could not reasonably be expected to be rezoned and therefore utilized for other purposes. I instruct you that if a knowledgeable owner or potential purchaser would have considered in 1975 and in 1978 that there was a reasonable possibility that the land at 104th Street and

117th Avenue could be rezoned for commercial or other high density usage within the reasonable future, then it was entirely proper for Mr. Scharrer to take that possibility into account in appraising the land given by Mr. Posner in those years.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	
v.	)	82-352-CR-SPELLMAN
VICTOR POSNER and WILLIAM SCHARRER,	)	
Defendants.	)	

DEFENDANT SCHARRER'S PROPOSED JURY INSTRUCTION #4A

The value of land on the market as well as for federal tax purposes is determined in light of all the potential uses to which the property could likely be put in the reasonable future. The fact that a piece of property is zoned does not necessarily restrict its value unless the property could not reasonably be expected to be rezoned and therefore utilized for other purposes. I instruct you that if a knowledgeable owner or potential purchaser would have considered in 1975 and in 1978 that there was a reasonable possibility that the land at 104th Street and

117th Avenue could be rezoned for commercial or other high density usage within the reasonable future, then Mr. Scharrer also was required to take that possibility into account in appraising the land given by Mr. Posner in those years.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	
v.	82-352-CR-SPELLMAN
VICTOR POSNER and WILLIAM SCHARRER,	
Defendants.	

DEFENDANT SCHARRER'S PROPOSED JURY INSTRUCTION #5

The central question of fact that you must resolve in this case is not what the actual value of the land at 104th Street and 117th Avenue was when Mr. Posner contributed it to Miami Christian College, or whether it could in fact have been rezoned for commercial or other high density usage. Rather, you must decide whether Mr. Scharrer himself believed the land was worth what he claimed it was worth in his appraisals and whether he believed the land could be rezoned. In determining what Mr. Scharrer believed with respect to these questions, you

may consider the evidence relating to Mr. Scharrer's long history as a successful real estate broker.

C. Fair Market Value

Source: United States v. 320.0 Acres of Land, 605 F.2d 762, 781 (5th Cir. 1979); Treasury Regulation § 20.2031-1(b); IRS Publication 561; IRS Valuation Guide for Income, Estate and Gift Taxes (1982).

A term that I already have used in these instructions must be defined -- that term is fair market value. Where a taxpayer donates to a charity property other than cash, he is entitled to take a deduction equivalent to the fair market value of that property. Fair market value has been defined as the price at which the property, after proper exposure to the marketplace for a reasonable time, would change hands between a willing buyer and a willing seller, neither party being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. including the potential market for the property. The term "willing buyer" is not limited to persons willing to purchase the property for immediate use, but also includes persons who are willing to purchase it

because they envision a potential future profitable use of it. Where real estate is involved, it has been recognized that the determination of fair market value is extremely complicated. It also has been recognized that there is no precise, single and unchallengeable right answer to the question of how much a piece of real estate is worth. Therefore, even honest and

D. Highest and Best Use

Source: United States v. 320.0 Acres of Land, 605 F.2d 762, 811-20 (5th Cir. 1979); IRS Valuation Guide

Another term that must be defined in connection with fair market value is highest and best use. When real estate is appraised, the property must be valued with reference to its highest and best use, since the price that a buyer will be willing to pay for a piece of land depends upon what he thinks the land can be used for. The highest and best use is the most profitable use of the property or that use which will yield the highest return on investment. The use must be one which is logical, likely, and reasonably probable and it will depend on a wide variety of factors such as the property's size, shape and location, potential for growth in the vicinity, the public highways and facilities that are planned or located nearby, and applicable zoning restrictions. The highest and best

use of land is not limited to such uses to which the property can be put immediately at the time of purchase, but also includes such use as a purchaser reasonably believes will become possible within the reasonable future. The length of time encompassed by the "reasonable future" cannot be arbitrarily determined, but depends instead on how long the purchaser believes it is profitable to wait after making his purchase. Because of the wide variety of factors that are important in

B. Distress Sales

Source: United States v. Wolfson, 573 F.2d 216, 221 n.9 (5th Cir. 1978)

Evidence also has been introduced concerning the fact that in 1977 and 1978 the Miami Christian College, through its officials, attempted to sell the land given it by Mr. Posner for a price substantially less than $2,000,000, and that Mr. Scharrer was aware of that sales effort and that Mr. Posner filed a lawsuit to prevent it. Evidence was also introduced concerning the financial condition of the College at the time of that sales effort from which you could find that the College needed to generate funds quickly from the sale of the property.

Fair market value is a question of fact to be resolved upon a consideration of all the evidence. If you find that the College's attempts to sell the land given it by Mr. Posner at a price less than the appraisal arrived at by Mr. Scharrer were motivated by

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a serious need on the part of the College to generate funds quickly, you may then conclude that those efforts to sell were not a true test of the property's fair market value and should be accorded little or no weight.

NOTARIZED STATEMENT OF DETAILS
OF FILING BY MAIL

STATE OF FLORIDA :

COUNTY OF DADE :

BEFORE ME the undersigned authority, personally appeared Atlee W. Wampler, III, Esquire, who upon being duly sworn did depose and say:

1. That I am a member of the Bar of the United States Supreme Court, having been admitted on April 16, 1980.

2. That on December 11, 1987 I mailed 40 copies of the foregoing Petition for Writ of Certiorari to the Clerk, United States Supreme Court, One First Street, N.E., Washington, DC 20543, by personally placing same in the United States post office located at 2200 N.W. 72 Avenue, Miami, Florida, with first class postage prepaid thereon.

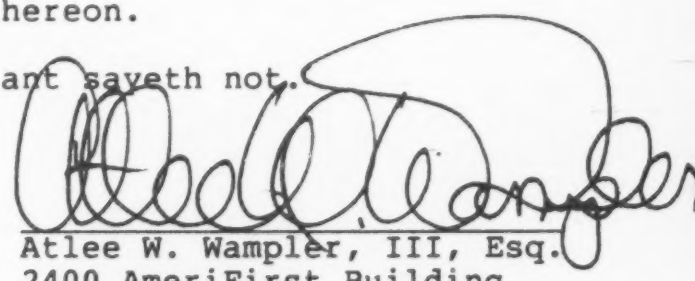
3. That on December 11, 1987 I mailed 3 copies each of the foregoing Petition for Writ of Certiorari to the following:

Solicitor General
Department of Justice
Washington, DC 20530

Neil S. Cartusciello, Esq.
Special Assistant U.S. Attorney
United States Attorney's Office
One Saint Andrews Plaza, Room 931
New York, NY 10007

by personally placing same in the United States post office located at 2200 N.W. 72 Avenue, Miami, Florida, with first class postage prepaid thereon.

Further affiant saveth not.



Atlee W. Wampler, III, Esq.
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-8880

Sworn and subscribed to and before me this 11th day of December, 1987.

Elizabeth A. Dombroski
Notary Public, State of Florida at Large

My Commission Expires:

Notary Public, State of Florida at Large
My Commission Expires Feb. 17, 1990
Bonded thru Maynard Bonding Agency

AXW0081-X

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-972

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM SCHARRER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
GARY R. ALLEN
ROBERT E. LINDSAY
DEBORAH W. DAWSON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

12P

QUESTIONS PRESENTED

1. Whether the prosecutor's cross-examination of petitioner and the prosecutor's summation violated petitioner's due process rights under *Doyle* v. *Ohio*, 426 U.S. 610 (1976).

2. Whether the jury instructions concerning the fair market value of certain property were sufficient.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 826 F.2d 773 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1987. A petition for rehearing was denied on October 13, 1987 (Pet. App. A5-A6). The petition for a writ of certiorari was filed on December 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of aiding and assisting in the filing of false income tax returns, in violation of 26 U.S.C. 7206(2);

one count of aiding and abetting tax evasion, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2; and one count of conspiracy, in violation of 18 U.S.C. 371. Petitioner was sentenced to two concurrent terms of 18 months' imprisonment, to be followed by two concurrent five-year terms of probation. U.S. C.A. Br. 2-3. The court of appeals affirmed (Pet. App. A1-A4).

1. The evidence at trial, which is not disputed, is set forth in the government's brief in the court of appeals. It establishes that on December 30, 1975, petitioner's co-defendant, Victor Posner, donated a 16-acre tract of undeveloped property to Miami Christian College. The next day, petitioner gave Posner an appraisal letter, valuing the property at $125,000 per acre. On December 29, 1978, Posner donated an adjacent 6-acre tract to the college. Petitioner thereafter gave Posner an appraisal letter stating that the value of that parcel was $175,000 per acre. Based upon petitioner's appraisals, Posner claimed a total of $3,050,000 in charitable contributions on his federal income tax returns. The evidence established, however, that the 16-acre tract was worth only about $33,000 per acre as of December 31, 1975, and that the 6-acre tract was worth only about $44,000 per acre as of December 29, 1978. The inflated appraisals allowed Posner to take more than $2,000,000 in unjustified deductions. The government also presented substantial evidence that petitioner knew that his appraisals were false. U.S. C.A. Br. 4-5.That evidence included petitioner's July 29, 1976, letter to Loren Felabom, the college's business manager, acknowledging that the appraisal of the 16-acre tract was "unrealistic" because it had been "developed for tax purposes."[1]

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[1] The July 29 letter stated (U.S. C.A. Br. 12):

> Enclosed herewith is a copy of the preliminary appraisals which were delivered to Mr. Posner December 30, 1975. The backup

Petitioner's defense was that it was reasonable for him to believe, and he honestly did believe, that the highest and best use of the property was for commercial purposes. Based on that premise, he claimed that the two appraisals, which assumed that the parcels could be rezoned to permit commercial development, were fair and accurate. At trial, petitioner offered an innocent explanation of his July 29, 1976, letter to Felabom. He asserted that what he had meant in that letter was that the college could not realistically "get the property rezoned for commercial use * * * because they would have jeopardized their tax-free status as a college." "And in that sense," petitioner continued, "to put it on the books for a price they couldn't actually sell it for at that time was unrealistic." U.S. C.A. Br. 47. At a meeting with the prosecutor prior to trial, however, petitioner, after receiving *Miranda* warnings, stated only that the July 29 letter was "poorly worded" (*id.* at 46).

On cross-examination, the prosecutor asked petitioner if he had given the same explanation of the July 29 letter when he met with the government prior to trial. At that point, the trial court and petitioner engaged in the following colloquy (Pet. 17-18):

> Scharrer: I wanted to give Mr. Handel [*sic*] the same explanation I gave the Court today, but my attorney would not let me.

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work has not been completed as yet; however, as soon as it is I'll send you a copy.

What we did was average the $1.5 million approximate figure with $2 million and came up with an average price of $1,750,000. This price is probably unrealistic inasmuch as it is being developed for tax purposes.

From a realistic market price I believe if we had to sell the property the amount of $50,000 an acre would probably be it.

If I can be of further service, please give me a call.

The Court: The answer is, though, at the time you didn't give the explanation, right, Mr. Scharrer?

Scharrer: That's correct. We just didn't answer it. My attorney said, "I will not permit my client to answer it."

The Court: All right. Let's move on.

The prosecutor also called attention during his summation to the discrepancy between petitioner's trial testimony and his earlier explanation of the July 29 letter.

In its instructions to the jury, the district court defined the terms "knowingly," "willfully" and "specific intent." The court then advised the jury that the "critical question" was (U.S. C.A. Br. 34):

> whether the Government has proved beyond a reasonable doubt that Mr. Scharrer did not honestly hold his stated opinions as to the fair market value of the land Mr. Posner gave and that he stated these opinions with the express purpose of assisting Mr. Posner in filing false and fraudulent returns.

The court also instructed the jury as follows (U.S. C.A. Br. 33):

> It is for you the jury to decide whether the evidence shows beyond a reasonable doubt that Mr. Posner and Mr. Scharrer knew that the $2 million fair market value claimed in 1975 and the $1,050,000 claimed in 1978 were inflated and thus were not the true and correct fair market value amount.

Regarding "fair market value," the court instructed as follows (Pet. 31-32):

> The rules and regulations of the Internal Revenue Service contain a definition for this term which you must apply. The rules say that fair market value is

the price at which the property would change hands between a willing buyer and a willing seller neither being under any compulsion to buy or sell and both having a reasonable knowledge of all of the relevant facts, any appraisal must consider its highest and best use.

2. The court of appeals affirmed (Pet. App. A1-A4). The court held (*id.* at A4) that "[a] review of the trial court's instructions reveals that, as a whole, the court gave a sufficient instruction on the manner by which fair market value is determined, and defendant's intent." It observed (*ibid.*) that the jury had heard expert testimony on market value and that it "was instructed substantially as requested as to how to weigh the experts' opinions." The court also noted (*ibid.*) that petitioner's counsel had "freely argued" the issue of intent and the significance of a future rezoning of the property. Finally, the court found the other issues raised by petitioner on appeal to be without merit, including the claim that the prosecutor had improperly commented on petitioner's post-*Miranda* silence during his cross-examination and summation (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 23-29) that the prosecutor's cross-examination of him concerning the July 29 letter to Felabom violated the rule in *Doyle* v. *Ohio*, 426 U.S. 610 (1976). The court of appeals correctly rejected that contention.

In the *Doyle* case, the prosecutor, over defense objection, was permitted by the trial court to question the defendants about why they had not given their innocent explanation of events to the police after their arrest. The prosecutor was also allowed to argue the defendants' post-

arrest silence to the jury. This Court held that the decision in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), "compel[led] rejection" of those forms of impeachment and argument. The Court observed that because *Miranda* warnings contain an implicit assurance "that silence will carry no penalty" (426 U.S. at 618), " 'it does not comport with due process to permit the prosecution during the trial to call attention to [the defendant's] silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony' " (*id.* at 619, quoting *United States* v. *Hale,* 422 U.S. 171, 182-183 (1975) (White, J., concurring in the judgment)).

By contrast, where a defendant "voluntarily speaks after receiving *Miranda* warnings," he has "not been induced to remain silent" (*Anderson* v. *Charles,* 447 U.S. 404, 408 (1980)), and the rule in *Doyle* is not implicated. And where a defendant has made post-*Miranda* statements that are inconsistent with his testimony at trial, the prosecutor is free to draw attention to that inconsistency. In that event, the prosecutor's remarks are "not designed to draw meaning from silence" (447 U.S. at 409), but rather are intended to show that the defendant's earlier statements contradict his trial testimony.

The prosecutor's cross-examination and summation in this case did not violate the rule in *Doyle.*[2] Petitioner did not remain silent at the pretrial meeting with the government. Rather, he offered an explanation of the July 29

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[2] Because the remarks were not error at all, we do not address the additional questions, raised by petitioner (Pet. 25-29), whether the harmless error standard applies to *Doyle* violations, whether the purported error in this case constituted a denial of due process, and whether a *Doyle* violation may be noticed as plain error in the absence of a sufficient objection.

letter that was inconsistent with his subsequent trial testimony. On cross-examination, the prosecutor sought to underscore that inconsistency, and he emphasized the point in summation. At no time did the prosecutor comment on silence. The prosecutor's questioning and summation were therefore permissible under this Court's decision in *Anderson* v. *Charles, supra.*

2. Petitioner argues (Pet. 29-35) that the court of appeals erroneously held that arguments of counsel may substitute for proper jury instructions, and that the trial court erroneously rejected certain of petitioner's requested jury charges. Both claims are meritless.

First, the court of appeals did not hold that a lawyer's argument to a jury may obviate the need for proper jury instructions. Indeed, the court made clear (Pet. App. A4) that it had "review[ed] * * * the trial court's instructions" and concluded that "as a whole, the court gave a sufficient instruction on the manner by which fair market value is determined, and defendant's intent." In passing, the court suggested (*ibid.*) that the significance of the instructions could not have been lost on the jury, since petitioner's counsel had "freely argued" the issue of intent and the possibility that the parcels could be rezoned. The court did not, however, hold that those arguments were an appropriate substitute for proper jury instructions.

Second, the trial court's instructions were correct, as the court of appeals held. The only contested issue at trial was petitioner's state of mind. The court carefully instructed the jury on the definition of fair market value and meticulously explained how that issue affected the question of intent. Taken as a whole, those instructions were entirely sufficient. See *Cupp* v. *Naughton,* 414 U.S. 141, 146-147 (1973). Nor is there any merit to petitioner's claim (Pet. 19-21) that the trial court erred in failing to give his requested instruction on "distress sales." The trial court

advised the jury that the government had to prove beyond a reasonable doubt that petitioner "did not honestly hold his stated opinions as to the fair market value of the land" (U.S. C.A. Br. 34), and the court further instructed that "fair market value is the price at which the property would change hands between a willing buyer and a willing seller *neither being under any compulsion to buy or sell*" (Pet. 31 (emphasis added)). Those instructions were plainly sufficient to enable the jury to assess the claim that the property had been offered for sale under conditions of financial distress. A defendant is not entitled to the exact language of the charge that he submits as long as the court's instruction fairly conveys to the jury the point of law in issue, as was done in this case. See *United States* v. *Dyman*, 739 F.2d 762, 771 (2d Cir. 1984), cert. denied, 469 U.S. 1193 (1985).[3]

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[3] Petitioner's reliance (Pet. 29-30, 32-34) on *United States* v. *Wolfson*, 573 F.2d 216 (5th Cir. 1978), is misplaced. In *Wolfson*, the trial court instructed the jury that in determining the weight to be given to the actual cost or sales price as a measure of fair market value, "[a] forced or distress sale should be accorded less weight in your consideration" (573 F.2d at 220). The court of appeals, in holding that instruction to be insufficient, could not find "[i]n light of the extensive evidence that the[] sales had little bearing on market value, * * * that this single sentence, using the legal jargon of 'forced or distress,' set in the midst of largely irrelevant instructions, was sufficient" (*ibid.* (footnote omitted)). In the present case, by contrast, there is no suggestion that the college's offer to sell the parcels was "largely irrelevant" to the question of market value. Moreover, the trial court carefully avoided the use of "legal jargon" and instructed the jury instead that " 'fair market value is the price at which the property would change hands between a willing buyer and a willing seller neither being under any compulsion to buy or sell.' " (Pet. 31).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
GARY R. ALLEN
ROBERT E. LINDSAY
DEBORAH W. DAWSON
Attorneys

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